Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

No. 71-477

FIRST REGULAR BAPTIST CHURCH
OF FRANKLIN, OHIO,

Petitioner,

vs.

INSURANCE COMPANY OF NORTH AMERICA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Identification of Parties: Throughout this Brief, the parties are designated as they were in the opinions of the courts below:

Petitioner : Church
Respondent: Insurance Company

All forms of emphasis used in this Brief have been added by the authors, unless otherwise specifically indicated.

In The

SUPREME COURT OF THE UNITED STATES

No. 71-477

FIRST REGULAR BAPTIST CHURCH
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INSURANCE COMPANY OF NORTH AMERICA,

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the District Court for the Southern District of Ohio is not reported and appears as Appendix A of the Petitioner's brief. The opinion of the Court of Appeals for the Sixth Circuit is reported in 444 F.2d 279 (1971). Since the opinion was amended in the order denying rehearing, it is included here as Appendix A as amended and as it is published.

STATEMENT OF THE CASE

The statement of the case found in the Petition for A Writ of Certiorari is generally correct except for the first sentence of the next to last paragraph wherein the Petitioner states that the Court of Appeals held that there can be no estoppel in Ohio in the "absence of willful or fraudulent misrepresentation." The actual holding in the majority opinion is "In order to constitute equitable estoppel in Ohio, there must exist a false representation or concealment of material facts, and it must have been made with knowledge, actual or constructive, of the facts. No estoppel will arise where the representation or conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake. . . ."

REASONS FOR NOT GRANTING THE WRIT

The decision by the Sixth Circuit Court of Appeals is not a departure from accepted federal case law which does not require that each decision reversing a District Court on a local law question be unanimous. Further, the decision of the Court of Appeals in this case is clearly supported by Ohio case law.

I.

While Title 28 United States Code, Rule 52 (a) provides, in part, ". . . Findings of *fact* shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . ." the instant case does not involve a question of fact and the United States Sixth Circuit Court of Appeals, in the opinion, fully adopted the facts as decided by the trial judge. The real question con-

sists rather of the legal standards required to be applied to the undisputed facts of the case. The trial judge's ultimate conclusion, therefore, is not shielded by the "clearly erroneous" test embodied in Rules 52 (a) of the Federal Rules of Civil Procedure. *United States* v. *General Motors Corp.*, 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed. 2d 415 (1966); *U.S.* v. *Mississippi Co.*, 364 U.S. 520, 81 S.Ct. 294, 5 L.Ed 2d 268. In addition it may be noted that a finding is "clearly erroneous" where, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394, 68 S.Ct. 525, 92 L.Ed. 746; *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 194; 83 S.Ct. 1773; 10 L.Ed. 2d 823.

The respondent here recognizes that the Circuit Courts of Appeal have stated, in a number of cases, that the decision of the trial court as to the law of the state in which it sits will be afforded "great weight" by the Courts of Appeal and that the view of the trial court will be accepted unless, as in this case, the Court is convinced that the trial court's determination was based upon a clear misconception or misapplication of local law, *Bookwalter* v. *Phelps*, 325 F.2d 186, but as Mr. Justice Blackmun stated in the dissenting opinion in *Bookwalter* v. *Phelps*: ". . . This court has not hesitated, nevertheless, when occasion demands, to reverse a federal trial judge on a question of state law if we have felt that his holding was improbable or less than 'permissible'. See, for example, *Massachusetts Bonding and Ins. Co.* v. *Julius Seidel Lumber Co.*, 279 F.2d 861, 869 (8 Cir. 1960); *Archer-Daniels Midland Co.* v. *Powell*, 293 F.2d 389, 397 (8 Cir. 1961); *L. C. Eddy, Inc.* v. *City of Arkadelphia*, 303 F.2d 473 (8 Cir. 1962) . . ."

The facts of the instant case, as set forth by the Sixth Circuit Court of Appeals in the opinion (Appendix A) indicate that they are unique in Ohio law and, in fact, research has developed no cases involving facts parallel to the facts of this case. This Court said in *Commissioner* v. *Bosch,* 387 U.S. 456; 87 S.Ct. 1776; 18 L.Ed.2d 886 ". . . This is not a diversity case but the same principle may be applied for the same reason, viz., the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court. *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198, 100 L.Ed. 199, 76 S.Ct. 273 (1956)."

In *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 93 L.Ed. 1520, 69 S.Ct. 1233, this Court affirmed a judgment of the Tenth Circuit Court of Appeals reversing the District Court upon the District Court's interpretation of Kansas law. This Court said ". . . We ordinarily accept the determination of local law by the Court of Appeals (see *Huddleston* v. *Dwyer,* 322 U.S. 232, 237, 88 L.Ed. 1246, 1249, 64 S.Ct. 1015) and we will not disturb it here."

And in *General Box* v. *United States,* 351 U.S. 159, 100 L.Ed. 1055, 76 S.Ct. 728, a case involving the application of Louisiana law, the decision of a highly respected and qualified district judge (see dissent by Mr. Justice Douglas) was reversed on the question of Louisiana law by the United States Court of Appeals for the Fifth Circuit. In the opinion, this Court said "We ordinarily accept the determination of the Court of Appeals on questions of local law, and we do so here. . . ." The *General Box* case is of

further interest and application to this case in that the decision of the Fifth Circuit Court of Appeals was not unanimous. The district judge, in other words, made a decision based upon an interpretation of local law, this decision was reversed by the Court of Appeals in a 2 to 1 decision (see 224 F.2d 7) and the Court of Appeals was affirmed by this Court.

In *Huddleston* v. *Dwyer,* 322 U.S. 232, 88 L.Ed. 1246, 64 S.Ct. 1015, this Court said ". . . The decisions of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore *do not review,* save in exceptional cases, the considered *determination of questions of state law by the intermediate federal appellate courts* . . ."

In *Byrd* v. *Blue Ridge Rural Elec. Corp.,* 356 U.S. 525, 2 L.Ed.2d 953, 78 S.Ct. 893; a diversity case involving the interpretation of a South Carolina statute the district court's interpretation of the South Carolina law was reversed by the Court of Appeals disagreeing with the district court's interpretation. On appeal to this court it was said "We ordinarily accept the interpretation of local law by the Court of Appeals, *cf. Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 534, 93 L.Ed. 1520, 1523, 69 S.Ct. 1233, and do so readily here since neither party now disputes the interpretation."

Additional cases in which it has been said that the Supreme Court of the United States will ordinarily accept the determination of the Court of Appeals on questions of State law are: *Richards* v. *United States,* 369 U.S. 1, 7 L.Ed. 2d 492, 82 S.Ct. 585; *Estate of Spiegel* v. *Commissioner,* 335 U.S. 701, 93 L.Ed. 330, 69 S.Ct. 301.

From the foregoing it appears that while a Circuit Court of Appeals will frequently accept a district court's determination on questions of local law, it is not bound to do

so and in some of the cases cited has reversed the district court on questions of local law. However, this Court has generally accepted the Circuit Court of Appeals' determination of questions of local law and this is so in cases wherein the Court of Appeals disagreed with the District Court on a question of local law, *General Box* v. *United States, supra.* In *Spiegel's Estate* v. *Commissioner, supra,* this Court said "It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of the question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law."

The fact that the decision of the Court of Appeals was not unanimous does not mean that the Court was in error in its determination of State law and would, in fact, indicate that reasonable arguments can be made based on Ohio cases to support a determination of the question either for or against the petitioner's contention. Therefore, under the circumstances, this Court should follow its general policy and leave undisturbed the Court of Appeals holding on a question of State law.

II.

The question presented to the Sixth Circuit Court of Appeals, as well as to the District Court, by the facts of this case was whether the Respondent (Insurance Company of North America) was estopped to apply a co-insurance provision of a fire insurance policy after a partial loss to the insured property. The facts of the case are set forth in the opinion of the Sixth Circuit Court of Appeals (Appendix A) and will not be repeated here. The District Judge as well as the three judges of The Sixth Circuit Court of Ap-

peals agree that without an estoppel being applied to the facts of the case the Petitioner (First Regular Baptist Church of Franklin, Ohio) is bound by the terms of the insurance contract including the co-insurance provision. In addition, the judges of the Court of Appeals, as well as the District Court agree that there was no willful or fraudulent misrepresentation on the part of the Respondent in establishing the gross amount of insurance to cover the Petitioner's property. In Ohio law, in the context of estoppel, fraud, bad faith, misrepresentation and gross negligence are nearly synonymous, *McKenzie* v. *Steele,* 18 Ohio St. 38; *Board of Education* v. *Sinton,* 41 Ohio St. 504; *Bank* v. *Flour Co.,* 41 Ohio St. 552. All of the judges agree that none of these elements are present in the instant case. There is no evidence of fraud, misrepresentation or gross negligence on the part of the Respondent in the case.

It is clearly the law of Ohio that an equitable estoppel cannot exist in the absence of one of the aforementioned elements. As the Sixth Circuit Court of Appeals said in the majority opinion of that Court in this case, "In order to constitute equitable estoppel in Ohio, there must exist a false representation or concealment of material facts, and it must have been made with knowledge, actual or constructive of the facts. No estoppel will arise where the representation or conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake. *Fleming* v. *City of Stubenville,* 44 Ohio App. 121, 125, 126 (1931); *New York Central R.R.* v. *General Motors Corp.,* 182 F.Supp. 273, 286 (N.D. Ohio, 1960); 20 Ohio Jur.2d, Estoppel and Waiver, Sec. 35."

In the dissenting opinion in this case, it is held that an estoppel *in pais* should apply in the case. To support this conclusion the Court cites *Beardsley* v. *Foot,* 14 Ohio St. 414 (1863); *Union Ins. Co.* v. *McCookey,* 33 Ohio St. 555

(1878); and *Mutual Finance Co.* v. *Politzer,* 21 Ohio St. 2d 177 (1970). In *Beardsley* v. *Foot, supra,* the action was to enjoin the defendant from asserting certain liens on real estate on the basis that the defendant had previously told the plaintiff that he owned no such lien knowing that the plaintiff intended to purchase the land. The defendant had admittedly forgotten about the liens he held upon the lands although he acted in good faith and without intent to deceive. In that case it was held that his negligence or forgetfulness was sufficient to establish an estoppel *in pais.* In *Union Ins. Co.* v. *McGookey, supra,* the facts were that the insurance company clothed its agent with apparent authority to issue the type of policy issued when, in fact, he had no such authority. The Court stated, "the law enforces the rule of good morals as a rule of policy, and estops a party from denying what cannot be denied without a breach of good faith . . ." In other words, bad faith on the part of a party to a contract will estop the party. Respondent has no quarrel with this principle of law but all of the judges below have agreed that there was no showing of bad faith on the part of Respondent. In *Finance Co.* v. *Politzer, supra,* the guarantor of a debt secured by a chattel mortgage made an agreement with the mortgagee which induced the mortgagee to so act as to provide the mortgagor with a statutory defense. It was held that this conduct by the guarantor estops him from taking the *unconscionable* position that the action of the mortgagee provides the guarantor with a defense. It was further held that this conduct estops the guarantor from enforcing any right to reimbursement from the mortgagor that would interfere with the defense that the guarantor knew he was providing for the mortgagor.

In all of the cases cited in support of the Petitioner's position there is the element of bad faith, negligence or

misrepresentation of a known fact. At the very least, in each of the cases there is evidence of mistake on the part of the party against whom the estoppel is claimed and the mistake is made in a matter in which the party sought to be estopped knew that the other would rely. In the instant case the trial judge stated "There is no evidence that the insurance company or anybody connected with it either defrauded or tried to defraud this church, and there is no evidence that either the insurance agent or both of them or anybody connected with the church made any effort to defraud the Insurance Company of North America, and there is no mutual mistake in a legal sense."

Ohio Courts have held that in the absence of proof of negligence there can be no estoppel. *Murfey, Blossom & Co.* v. *State,* 4 Ohio Ops. 443, 20 OL Abs. 176, 31 NE2d 134, affirmed by the Supreme Court in 131 Ohio St. 289, the Court said: "The doctrine of estoppel is usually applied to cases where the party sought to be estopped was guilty of some negligence or lack of diligence. If he is guilty of some negligence or lack of diligence he must take the consequences of his own acts which mislead others to act to their injury. We maintain that the doctrine of estoppel was never applied to a case where the person sought to be estopped was guilty of no negligence or lack of diligence whatsoever . . ." In the majority opinion of the Sixth Circuit Court of Appeals in this case the Court, at footnote 2, says, "The dissent bases estoppel *in pais* on the ground that Weaver in his appraisal made a mistake. There was no proof that Weaver made a mistake, but even if he had, unless it was a negligent mistake, there could be no estoppel *in pais, Beardsley* v. *Foot,* 14 Ohio St. 414, 416 (1863), relied on in the dissent. Nor was there any proof that Weaver was negligent."

It may be said, generally, that in Ohio the essential elements of equitable estoppel are:

1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with those which the party subsequently attempts to assert;

2) intention, or at least expectation, that such conduct shall be acted upon by the other party;

3) knowledge, actual or constructive, of the real facts.

As related to the party claiming the estoppel, the essentials generally are:

1) lack of knowledge and of the means of knowledge of the truth as to the facts in question;

2) reliance upon the conduct of the party estopped;

3) action based thereon of such character as to change his position prejudicially.

20 *Ohio Jurisprudence (2d)* 498 et seq.

It is considered elemental in the law of estoppel that knowledge on the part of one sought to be estopped is essential, *Bear* v. *Colonial Finance,* 42 Ohio App. 482. The material fact must be known to the party sought to be estopped at the time of his acts or conduct on which the estoppel is based, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. *New York Central Railroad* v. *General Motors Corp.,* 12 Ohio Op. (2d) 349, 182 F.Supp. 273. Gross negligence in failing to ascertain the facts has, in some cases, been regarded as equivalent to actual knowledge as a basis for

forming an estoppel. However, such negligence may not be induced by the fraud or representations of the other party and such negligence will not prevent a denial of knowledge in cases where the party asserting the estoppel is under as great a duty to learn the truth as is the party against whom the estoppel is asserted where the means of doing so are equally available. 20 *Ohio Jurisprudence (2d)* 507, et seq. In addition, in *Fleming* v. *City of Steubenville,* 44 Ohio App. 121, at 126 it is said "No estoppel arises where the representations or conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake." Further, the *City of Steubenville* case, *supra,* quotes with approval language in 21 Corpus Juris 1119 to this effect: "In order to constitute this kind of estoppel there must exist a false representation or concealment of material facts; it must have been with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied upon or acted upon it to his prejudice." The *City of Steubenville* case involved a dispute as to the width of a roadway where abutting owners had improved portions of the roadway by establishing lawns, gardens, etc. within what developed to be the right of way and the Court said "The city authorities had no more knowledge, and no more knowledge was accessible to them, than could be obtained in the same manner and by the same degree of diligence by the abutting owners." In *McKenzie* v. *Steele,* 18 Ohio St. 38, the Supreme Court of Ohio said, "To work an estoppel there must be prejudice to the party setting it up, and also fraud or bad faith — or their equivalent, gross negligence -- in the party to be estopped."

To like authority see *Board of Education* v. *Sinton,* 41 Ohio St. 504; *Bank* v. *Flour Co.,* 41 Ohio St. 552. In addition the representation must be of a material fact as opposed to an opinion or conclusion. 28 Am.Jur. (2d) 655. And as the trial judge found "There was a mutual mistake in a matter of opinion in the valuation of this building. There isn't any question about that, but that is a matter of opinion; it doesn't amount to any false representation, doesn't amount to any law-sense mutual mistake." In other words, the representation as to the value of the building was a representation on a matter of opinion and not of fact.

There is no question that the policy was written in the face amount of $570,000. There is also no doubt that the policy contained a 90% co-insurance clause and that the $570,000 limit of coverage was insufficient to comply with co-insurance provision. It then becomes the question as to who has the responsibility to make sure that the premises are adequately insured to comply with the provision. The record contains both testimony and the finding of the trial judge that the purpose in the so-called appraisal by the defendant was to make sure that the property was not overinsured. However, the effect of the Petitioner's argument is that the insurer becomes responsible to see that the property is properly insured. Such intent is not expressed in the evidence or in the policy. Nor does the law so hold. *Zechar* v. *All American Casualty Co.,* 116 Ohio App. 41. In the *Zechar* case the second headnote is:

> "2. In an action by the insured under a contract of insurance, the plaintiff cannot, on the theory of estoppel, obtain a greater right than that set forth in the contract of insurance."

The contract of insurance is clear and unambiguous, it should be given its clear meaning and intent. The trial

court's holding and Petitioner's argument here, in effect, say that it is all right that the Petitioner paid a premium based upon $570,000 coverage but that the insurance company should pay the loss as if the coverage had been $769,-514. To Respondent this seems to be giving the Petitioner a greater right than that set forth in the contract of insurance.

CONCLUSION

The Petition for A Writ of Certiorari should be denied. Prior decisions of this Court have involved exactly the same situation as that involved in this case, that is, a divided decision by the Circuit Court of Appeals reversing a decision of the trial court on a question of local law, *General Box* v. *United States*, 351 US 159, 100 L.Ed. 1055, 76 S.Ct. 728, and this court affirmed the Circuit Court of Appeals. There is nothing new or novel in the occurrence.

Further, the decision of the Court of Appeals for the Sixth Circuit does not conflict with the established case law of Ohio and certainly the majority decision in this case is reasonable and supported by the Ohio law. This Court should, therefore, follow its general policy and leave undisturbed the Court of Appeals holding on a question of State law. *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 93 L.Ed. 330, 69 S.Ct. 301.

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APPENDIX A

No. 20740

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FIRST REGULAR BAPTIST CHURCH OF FRANKLIN, OHIO, *Plaintiff-Appellee,* v. INSURANCE COMPANY OF NORTH AMERICA, *Defendant-Appellant.*	APPEAL from United States District Court for the Southern District of Ohio, Western Division.

Before WEICK, EDWARDS and BROOKS, Circuit Judges.

WEICK, Circuit Judge.

The only issue in this appeal is whether the Insurance Company is estopped from invoking the 90% co-insurance clause in a fire insurance policy.

The Church owned a structure in Franklin, Ohio, consisting of a sanctuary building of the vintage of 1893, which was connected to a new educational building constructed in 1964, at a cost of $300,000.

Prior to the issuance of the policy of fire insurance in suit, the insurance business of the church had been divided between two insurance agents, Carl Morgan and

Fred Meeker, both of whom were members of the church. The insurance on the sanctuary building totaled $125,000. Insurance on the education building totaled $300,000. Meeker wrote two-thirds of the insurance of the sanctuary, in seven or eight policies; Morgan wrote one-third of the insurance on the sanctuary in a number of policies, plus the coverage on the new education building. Meeker had written insurance policies for the church since 1921, and prior to that time his father had the church's insurance business.

Meeker proposed to Morgan that the church, instead of having so many policies of insurance, should have one package policy, and that it should receive bids for the business; Morgan agreed. Meeker also discussed his proposal with the pastor of the church, and told him that his company wrote a policy with broad coverage providing for replacement without depreciation.

Meeker appeared before a meeting of the trustees of the church and the trustees agreed to the proposal. Meeker also suggested that an appraisal of the sanctuary be made by his company, which suggestion was also approved by the trustees. The appraisal was made by Ronald Weaver, who was a special agent of the Insurance Company and was experienced in the appraisal of buildings for insurance purposes. Weaver was also a member of the church.

Weaver appraised the new education building at the full amount of its cost, $300,000. He appraised the sanctuary at $250,000. In making the appraisal of the sanctuary, he examined the building, took measurements of it, and determined it had 197,600 cubic feet. He then used Beck's Manual, which was standard in the insurance industry, to obtain a value of $254,221, which figure was rounded off to $250,000-valuation.

Bids for the package policy were submitted by Meeker and Morgan.[1] Meeker's bid of $687-annual premium was low, and he was awarded the business. Morgan's bid was twice the amount of Meeker's bid.

The policy in suit was then written for $570,000, which included $20,000 covering contents of the buildings. The policy contained a ninety per cent co-insurance clause which provided:

> "This Company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured [$570,000] bears to * * * [90%] of the actual cash value of the property at the time of the loss."

The policy was delivered to and accepted by the church.

Meeker's recollection was that the other policies that he had previously written contained co-insurance clauses. The evidence was to the effect that most industrial and church properties were insured by policies with co-insurance clauses. The use of such clauses resulted in substantial savings in premiums, ranging from 15% to as much as 80% on insurance covering fireproof buildings. The purpose of the co-insurance is to require the insured to carry insurance for the full value of the property. Where the property is under-insured, the insured is required to assume his proportionate share of the loss.

On June 19, 1965 a fire, caused by arson, totally destroyed the sanctuary and partially damaged the education building. The parties were unable to agree on the amount payable under the policy, and arbitration was invoked. The arbitrators determined the total value of the buildings

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[1] At that time Morgan was selling his insurance agency to Ralph E. Wade.

and contents at the time of the fire was $855,016.19, and that the partial loss sustained amounted to $574,935.36.

The Insurance Company then invoked the 90% co-insurance clause in the policy, using the following equation:

$$\frac{\$570{,}000 \text{ (amount of insurance)}}{\$769{,}514 \text{ (90\% of full replacement value)}} \times \$574{,}935.36 \text{ (actual loss)} = \$425{,}810$$

The Insurance Company added $4,529.50, additional expenses not covered by the co-insurance clause, and paid $430,399.78 to the church. The church was not satisfied with payment of this amount and instituted the present action to recover the difference between the amount of the payment and $570,000 which was the face amount of the policy. The District Court, applying the doctrine of equitable estoppel, entered judgment against the Company in the full amount of $144,129.72, plus interest.

It was the theory of the church that the insurer was estopped to invoke the 90% co-insurance clause because it had appraised the sanctuary too low and had used the appraisal in fixing the face amount of the policy. The only proof offered, however, to establish the claim that Weaver's appraisal was too low was the award of the arbitrators as to the value of the property more than a year later.

The District Court in its findings of fact found that both agents (Meeker and Morgan) in their handling of the insurance "proceeded in good faith." It found: "There is no claim here of fraud or mistake."

The Court further found:

> "So, insofar as this case involves this question — and it does, because of about $2,000 of it does — there is no fraud here. There is not even the slightest evidence of fraud, let alone clear and convincing evidence. There is no evidence that the insurance company or

anybody connected with [15] it either defrauded or tried to defraud this church, and there is no evidence that either the insurance agent or both of them or anybody connected with the church made any effort to defraud the Insurance Company of North America, and there is no mutual mistake in a legal sense.

"There was a mutual mistake in a matter of opinion in the valuation of this building. There isn't any question about that, but that is in a matter of opinion; it doesn't amount to any false representation, doesn't amount to any law-sense mutual mistake. So that insofar as this case involved the question of whether or not this Court could change this policy so as to substitute a figure for the $570,000 figure appearing on page 1, the answer is this Court cannot, nor can this Court delete the coinsurance clause because of the conclusive presumption of knowledge which the Supreme Court of Ohio has dictated and to which this Court, of course, must be obedient."

The Court concluded:

"So the problem boils down to: May an insurance company that agrees to the valuation on page 1 contest that valuation under a coinsurance clause on page 4? It's the conclusion of law of this Court that, having so agreed, the company may not."

It is the church rather than the Insurance Company which is contesting the valuation of $570,000 (face amount of the policy). The annual premium of $687 was computed on this amount. The church contends that the property should have been appraised at $855,016.19 (the appraisal by the arbitrators, made more than a year later) and that this amount should have been the face amount of the policy. The difference between the two appraisals is $285,016.19. The church, however, paid no premium for a valuation in excess of $570,000.

The findings of fact, in our opinion, compel a conclusion different than that reached by the District Judge.

There was not an iota of evidence offered by the church that Mr. Weaver, in making the appraisal of the sanctuary, was negligent or that he made a mistake or that Beck's Manual, which he used and which is standard in the insurance industry, was improper to use in making the appraisal. Nor is there any evidence that the trustees of the church were ignorant, did not know what they were doing, or were imposed on by Meeker and Weaver, who were loyal members of the church. It was Meeker who equipped the new chapel.

The District Court's conclusion is based entirely on the fact that the arbitrators, more than a year later, arrived at a replacement value which was much higher than Weaver's earlier appraisal, and the fact that there was no proof of any value change during the intervening period.

The burden of proof to establish estoppel, however, was on the church, and it is clear that the church failed to meet its burden. It must be remembered that the arbitrators on May 3, 1967, nearly three years after Weaver's appraisal, appraised the property as of the date of the fire, June 19, 1965, and that the church did more than merely replace its old sanctuary with a comparable new one.

Mr. Weaver testified on cross-examination:

> "Q How many cubic foot are in the present edifice, approximately?
>
> "A I couldn't answer that question. I think it's bigger; yes, sir.
>
> "Q I see. And the ceilings and so forth are bigger, deeper?
>
> "A Yes. The edifice that's now standing where the old church did doesn't resemble the old church in any way shape or form.

"Q In other words, there is no comparison between the present church and the old church?

"A No, sir."

The new sanctuary was not completed and occupied until November 2, 1969.

Furthermore, if we are to indulge in drawing inferences, it is equally as probable that the arbitrators arrived at a valuation too high, as it is to infer that Weaver's appraisal was too low. But estoppel may not be established by mere inferences. We also know that opposing appraisers who testify in court do not always arrive at the same figure.

Insofar as Mr. Weaver's appraisal of the sanctuary is concerned, it was in an amount which was twice the amount of insurance previously carried on the sanctuary; and Mr. Weaver appraised the new education building at the full amount of its cost.

Section 3929.25, Ohio Revised Code, provides:

> "A person, company, or association insuring any building or structure against loss or damage by fire or lightning, by renewal of a policy, shall have such building or structure examined by his or its agent, and a full description thereof made, and its insurable value fixed, by said agent. In the absence of any change increasing the risk without the consent of the insurers, and in the absence of intentional fraud on the part of the insured, in the case of total loss the whole amount mentioned in the policy of renewal, upon which the insurer received a premium, shall be paid."

Special Agent Weaver literally complied with this statute in making the appraisal. No estoppel can operate, therefore, against the insurer merely because it complied with the Ohio law.

The only purpose of the statute's requirement of inspection and appraisal was to fix a liability on the insurer for payment of the whole amount of the policy of insurance in case of a total loss. There the loss was only partial. The District Court held that the church was bound by the co-insurance clause except for the estoppel. There was no evidence that the church objected to Weaver's appraisal. If the church was dissatisfied with Weaver's appraisal, there was nothing to prevent it from having the structure appraised by another appraiser.

[1-3] In order to constitute equitable estoppel in Ohio, there must exist a false representation or concealment of material facts, and it must have been made with knowledge, actual or constructive, of the facts. No estoppel will arise where the representation or conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake.[2] Fleming v. City of Steubenville, 44 Ohio App. 121, 125, 126, 184 N.E. 701 (1931); New York Central R.R. v. General Motors Corp., 182 F.Supp. 273, 286 (N.D.Ohio, 1960); 20 Ohio Jur.2d, Estoppel and Waiver, § 35.

The judgment of the District Court is reversed and the cause is remanded with instructions to dismiss the complaint.

EDWARDS, Circuit Judge (dissenting).

The District Judge, after trying the disputed issues of fact in this case, found that appellant insurance company

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[2] The dissent bases estoppel in pais on the ground that Weaver in his appraisal made a mistake. There was no proof that Weaver had made a mistake, but even if he had, unless it was a negligent mistake there could be no estoppel in pais, Beardsley v. Foot, 14 Ohio St. 414, 416 (1863), relied on in the dissent. Nor was there any proof that Weaver was negligent.

had proposed the figure of $570,000 as the full replacement value of the property to be insured:

> "This Court finds as a fact that at that time Mr. Meeker, representing and an agent of the Insurance Company of North America, and the church agreed that in fact the '100 percent' valuation of those two buildings at that time was $570,000. The defendant 'proposed that' (Plaintiff's Exhibit 10) and proposed that value as the full one for inclusion in a 90 percent co-policy."

He also found as to the actual value at the time of loss:

> "Now, the policy contains an arbitration clause and this matter went to arbitration for the fixation of two figures; A, the value of the church, replacement value, total replacement value of the church at the time of the loss in June of 1965 or nine days after the renewal. The arbitrators found that to be $855,000. The replacement cost under the loss payment clause on page 4 of the policy was determined by the arbitrators to be $574,935.76, that being the replacement cost of the partial loss which actually took place."

He then summarized the legal problem posed by the case as follows:

> "So that Mr. Meeker for purposes of this policy was the Insurance Company of North America, and it was Mr. Meeker, we find as a fact, who suggested the insurable value which was acquiesced in and as a matter of contract was agreed on by the parties to this case in June of '64 and carried over in the renewal.
>
> "So the problem boils down to: May an insurance [20] company that agrees to the valuation on page 1 contest that valuation under a coinsurance clause on page 4?"

The District Judge then held that under the facts outlined above appellant insurance company was estopped from reliance upon the 90% coinsurance clause as a limitation on recovery under the policy.

On this record it is undisputed that the $570,000 valuation in the policy resulted from appellant insurance company's appraisal and that Meeker (who was found by the District Judge to be agent of the insurance company) represented that figure as the 100% value to the plaintiff church and told the church that it could rely on that value and that the plaintiff church did so rely in signing the contract.

As the majority opinion holds, estoppel is a doctrine which generally requires a fraudulent representation, or intentional misrepresentation with knowledge, plus reliance by the opposite party to its damage. New York Central R.R. v. General Motors Corp., 182 F.Supp. 273, 288 (N.D. Ohio 1960); 20 Ohio Jur.2d Estoppel and Waiver § 35 (1956).

What is lacking in this case, of course, is the element of willful or fraudulent misrepresentation.

The law of Ohio also recognizes a form of estoppel called "estoppel *in pais*" under which statements made in good faith may furnish grounds for estoppel.

In the leading case on this subject the Supreme Court of Ohio held:

> "Admissions *in pais*, though made in good faith, may yet be made under such circumstances as to operate by way of estoppel, and preclude the party from afterward gainsaying them." Beardsley v. Foot, 14 Ohio St. 414 (1863).

See also Union Ins. Co. of Dayton v. McGookey, 33 Ohio St. 555 (1878).

While *Beardsley* is an old case, it has recently been cited with approval by the Ohio Supreme Court. Mutual Finance Co. v. Politzer, 21 Ohio St.2d 177, 256 N.E.2d 606 (1970).

Where, as here, the access to information is substantially greater on the part of one party and that party both creates the mistake and urges the opposite party to rely thereon to its ultimate damage, I feel that Ohio law permits a court in equity to hold that the party basically responsible is estopped from taking advantage of its own mistake.

In an opinion holding an insurance company was estopped from relying upon a written condition of the policy, the Ohio Supreme Court said:

> "The tendency of many courts is to apply the principles of waiver and estoppel in a liberal manner to insurance contracts to enforce good faith and to prevent injustice and fraud where the insured has been misled by the acts of the insurer or its agents." Pannunzio v. Monumental Life Ins. Co., 168 Ohio St. 95, 106, 151 N.E.2d 545, 552 (1958).

I would affirm the judgment of the District Court.